# INDEX


| | Page |
|---|---|
| Opinion below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute and regulations involved | 3 |
| Statement | 3 |
| Specification of errors to be urged | 10 |
| Reasons for granting the writ | 10 |
| Conclusion | 19 |
| Appendix | 20 |


## CITATIONS


Cases:

*Addison* v. *Holly Hill Fruit Products Inc.*, 322 U. S. 607 — 11, 12

*Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 — 14

*Brown* v. *Cummins Distilleries Corp., et al.*, 53 F. Supp. 659 — 4

*Collins* v. *Fleming*, No. 371, Emergency Court of Appeals (1947) — 4

*El Dorado Oil Works* v. *United States*, 328 U. S. 12 — 12

*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422 — 12

*Martini* v. *Porter*, 157 F. 2d 35, pending on petition for a writ of certiorari, *sub nom. Martini* v. *Fleming*, No. 813, this Term — 10, 11, 14

*Porter* v. *Senderowitz*, 158 F. 2d 435, pending on petition for certiorari, *sub nom. Senderowitz* v. *Fleming*, Nos. 677–678, this Term — 10, 11

Statute:

Emergency Price Control Act of 1942 (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, Secs. 901 *et seq*:

Section 1 (a) — 14, 20

Section 2 (a) — 14, 21

Section 2 (c) — 14, 23

Section 4 (a) — 24

Section 201 (d) — 25

Section 202 (a) — 25

Section 203 (a) — 25

Section 204 (a) — 26

Section 204 (b) — 27

Section 205 (e) — 18, 28




733276—47——1

Miscellaneous:
General Maximum Price Regulation: Page
Section 1499.2 ---------- 32
Section 1499.3 ---------- 5, 13, 35
Maximum Price Regulation 193 ---------- 4
Rule 1 (Sec. 1420.13 (a)) ---------- 4, 5, 6, 15, 29
Rule 2 (Sec. 1420.13 (b)) ---------- 5, 6, 15, 31
Rule 3 (Sec. 1420.13 (c)) ---------- 5, 6, 8, 10, 13, 15, 16, 32
Order No. 45 ---------- 7, 14, 16, 38

# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. 1080

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, PETITIONER

*v.*

CHRISTINE COLLINS, ET AL.

No. 1081

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, PETITIONER

*v.*

ADOLPH HIRSCH

No. 1082

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, PETITIONER

*v.*

WILLIAM M. MORRISON, ET AL.

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**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS**

The Acting Solicitor General, on behalf of Philip B. Fleming, Temporary Controls Administrator, Office of Temporary Controls, petitioner herein, prays that writs of certiorari issue to

review the judgments of the United States Emergency Court of Appeals, entered in the above-entitled cases on January 2, 1947.

### OPINION BELOW

The original opinion of the United States Emergency Court of Appeals (R 310–320) and its opinion on the petition for rehearing (R. 340–341) have not yet been reported.

### JURISDICTION

The judgments of the United States Emergency Court of Appeals were entered on January 2, 1947 (R. 328–329), and on January 30, 1947, the Administrator's petition for rehearing was denied (R. 341). The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Supp. V, 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

### QUESTION PRESENTED

Where a regulation established maximum prices for sales of a commodity in other than dollars-and-cents terms and required sellers in certain cases to apply to the Administrator for orders prescribing the method by which such established maximum prices are to be determined in dollars-and-cents terms, may the Administrator, in the event a seller has failed to make application as required by the regulation, issue such an order covering sales which have already been made, after

the Administrator has filed a treble-damage suit in the United States District Court charging that such sales were made in violation of the regulation?

### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended (hereinafter sometimes termed the Act) and of the applicable maximum price regulations involved, are set forth in the Appendix, *infra*, pp. 20–38.

### STATEMENT

The respondents are all former stockholders of the Cummins Distilleries Corporation (R. 2, 19, 33) which was engaged from 1933 until December 1942, in the business of selling whiskey in bulk and in cases (R. 61). During the month of December 1942, the Corporation divested itself of its assets and was dissolved (R. 76–120). Warehouse receipts covering approximately 51,000 barrels of bulk whiskey were distributed by the Corporation to a "stockholders distribution committee." (R. 147, 321.) Between the dates of January 4 and 9, 1943, the committee, on behalf of the stockholders, sold the warehouse receipts at the best prices obtainable (R. 12, 21, 33, 45, 46, 61, 64), on the alleged assumption that such sales were not subject to price control.[1] (R. 3, 22, 34–35.)

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[1] The court below held that Maximum Price Regulation 193 was applicable to the sales of the warehouse receipts made by the respondents during January 1943, that such sales were

On May 27, 1943, the Administrator, for and on behalf of the United States, instituted a treble-damage suit under Section 205 (e) of the Act in the United States District Court for the Western District of Kentucky charging the Cummins Distilleries Corporation, its officers and directors, its stockholders' distribution committee, the respondents herein as individuals, and others with having made overceiling sales (R. 12–13, 22–23, 46–47). This litigation is still pending (R. 59–120).

At the time the sales in question were made, Maximum Price Regulation 193 (hereinafter sometimes termed "MPR 193") set forth three rules under which maximum prices for domestic distilled spirits were to be determined.[2] These were as follows:

*Rule 1.*—Section 1420.13 (a) of MPR 193, *infra*, pp. 29–31, provided that the seller's maximum price should be his maximum price established under Section 1499.2 (a) of the General Maxi-

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sales of bulk whiskey at wholesale covered by that regulation, and that the regulation was valid as applied to such sales. These determinations by the court below are not in issue in this proceeding. The Court also reached the same result in *Collins, et al.* v. *Fleming*, No. 371 (ECA Jan. 2, 1947), in which case the respondents in No. 352, now before this Court, were the complainants. The judgment in No. 371 has become final. See also *Brown* v. *Cummins Distilleries Corp. et al.*, 53 F. Supp. 659 (W. D. Ky.) (R. 160–165).

[2] Bulk whiskey was first brought under price control by the General Maximum Price Regulation (R. 194). MPR 193 superseded the General Maximum Price Regulation when it became effective on August 5, 1942 (R. 194).

mum Price Regulation (hereinafter sometimes termed "the GMPR"), plus certain specified additions not here relevant. The applicable section of the GMPR provided that the seller's maximum price should be the highest price charged by him during March 1942 for the same or similar commodity.

*Rule 2.*—Section 1420.13 (b) of MPR 193, *infra,* pp. 31–32, provided that if a seller could not determine his maximum price under Section 1420.13 (a), his maximum price should be the maximum price established under Section 1420.13 (a) for his most closely competitive seller.

*Rule 3.*—Finally, Section 1420.13 (c) of MPR 193, *infra,* p. 32, provided that if a seller could not determine his maximum price under either Section 1420.13 (a) or Section 1420.13 (b),[3] his maximum price should be determined in accordance with Section 1499.3 of the GMPR. Section 1499.3 of the GMPR, *infra,* pp. 35–38, at the time respondents made the sales in question, provided that each seller's maximum price "shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation."[4] It provided further that

[3] Hereinafter in this petition subsections (a), (b), and (c) of Section 1420.13 of MPR 193 will be designated as Rules 1, 2, and 3, respectively.

[4] Since Section 1499.3 of the GMPR was incorporated by reference into MPR 193, this provision for present purposes must be read as referring to the level of maximum prices established by MPR 193, and the court below so indicated (R. 318).

"such price shall be determined by the seller in accordance with the following procedures." The procedures which followed were set forth in the four subparagraphs of that Section. Subparagraph (c), *infra*, p. 37,[8] provided that in the case of a sale at wholesale the maximum price should be a price determined by the seller after specific authorization from the Office of Price Administration given "in the form of an order prescribing a method of determining the maximum price." A seller seeking such authorization was required to file an application for such an order.

In the treble-damage suit against respondents, the Administrator proceeded initially on the theory that respondents' maximum prices were governed by Rule 2, *supra*, p. 5, that is, by reference to the maximum prices of their most closely competitive sellers (R. 187, 313). In the course of the proceeding, respondents took the position that they had no closely competitive sellers whose maximum prices they could use as a reference. If respondents were correct in this, and if Rule 1, *supra*, pp. 4–5, did not apply because respondents had made no sales of bulk whiskey in March 1942, it would be necessary to apply Rule 3, *supra*, p. 5, to the sales made by respondents in January, 1943, since MPR 193 covered the sales in question. Respondents had not, however, made application to the

[8] It is undisputed that the other three subparagraphs have no application to this case.

Administrator under Rule 3 for an order prescribing a method of determining their maximum prices, as required by the regulation. The Administrator thereupon gave respondents an opportunity to file the requisite application under Rule 3 (R. 16, 27–28). Respondents rejected this opportunity, reiterating their position that the sales in question were not subject to any price control (R. 17–18, 29). Consequently, on June 13, 1945, the Administrator on his own initiative issued Order 45, *infra,* pp. 38–40, pursuant to Rule 3.

That Order provided that respondents' maximum prices for the sales in question were the maximum prices established in accordance with Rule 1 or Rule 2, but that in the event those Rules were found to be inapplicable, the dollars-and-cents maximum prices should be determined in accordance with a prescribed method designed to yield dollars-and-cents prices in line with the level of maximum prices established for bulk whiskey by MPR 193 (R. 185).[8] In the protest proceedings be-

[8] Order 45 provided that the specific dollars and cents maximum prices applicable should be those set forth in Section 1420.13 (g) of MPR 193, adjusted in accordance with the age of the whiskey sold (R. 185). That section had been added to MPR 193 by Amendment 4 to that regulation on February 3, 1943 (8 F. R. 1632). It specified as dollars and cents maximum prices for bulk whiskey prices found by the Administrator to be "in line" with the level of maximum prices prevailing during March 1942, the base period used under the GMPR and MPR 193. Thus when Order 45 was issued the Administrator prescribed as the method of determining respondents'

fore the Administrator and in the court below, respondents contended that Order 45 was not authorized by the regulation or the Act and, if authorized, was in conflict with the United States Constitution (R. 5, 26, 42). The court agreed with the Administrator's contention that Rule 3 established maximum prices for respondents' sales and that Order 45 merely specified in dollars-and-cents what the prices computed under that Rule were (R. 317), but held that, in the absence of applications by the respondents, neither Rule 3 nor the Act itself authorized the issuance of such an Order (R. 318). The court was of the opinion that sellers coming under Rule 3 could elect to file applications for such administrative orders, or not to file and await the determination of their proper dollars-and-cents maximum prices in a possible enforcement suit in a district court (R. 317–319). The court further held that the Act did not authorize Order 45 because that order did not effectuate any of the purposes of the Act. The court found that the only object of Order 45 was to liquidate the damages in the enforcement suit, an issue which, in the court's opinion, the Administrator had already committed to the district court, and that it was not one of the purposes of the Act to authorize the Administrator to decide such an issue.

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maximum prices reference to the table setting forth the prices already ascertained to have been prevailing during the base period and adjustment of those prices according to the age of respondents' whiskey.

The court then expressed the view that "it is most doubtful" whether the Congress could have authorized the Administrator to issue such an order as Order 45, and stated that (quoting from its opinion in *Royal Lee* v. *Fleming,* decided December 13, 1946, E. C. A., pending on petition for certiorari, No. 875):

> Such action would not only appear to involve the usurpation of judicial power which is vested in the courts alone, but would also clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal.

Because the objection that Order 45 usurped the judicial power of the District Court for the Western District of Kentucky had not been raised in the protest proceedings, and in order to clarify the basis for the court's decision, the Administrator petitioned for a rehearing. The petition was denied on January 30, 1947 (R. 340–341). In its opinion on the petition for rehearing the court below, reiterating its position that Order 45 was invalid because it was not authorized by the regulation or the Act, said:

> * * * It is true that we suggested that if the act had authorized such an order as Order No. 45 it might well have been unconstitutional as involving usurpation of judicial power but our conclusion was that Congress had no such purpose in mind in passing the Act. (R. —).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred (a) in construing Rule 3 as giving respondents a choice between filing applications for orders under Rule 3 and awaiting the determination of their maximum prices in dollars-and-cents terms by a district court in a possible enforcement proceeding and therefore (b) in construing Rule 3 as not authorizing Order 45.

2. The court below erred in holding that Order 45 was not authorized by the Act on the ground that it did not effectuate any of its purposes.

3. The court below erred in holding that the determination of respondents' appropriate dollars-and-cents maximum prices was a judicial rather than an administrative function.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the views expressed by the Circuit Courts of Appeal for the Third and Ninth Circuits in the cases of *Porter* v. *Senderowitz,* 158 F. 2d 435 (C. C. A 3), pending on petition for writs of certiorari, *sub nom. Senderowitz* v. *Fleming,* Nos. 677 and 678, and *Martini* v. *Porter,* 157 F. 2d 35 (C. C. A. 9), pending on petition for a writ of certiorari, *sub nom. Martin* v. *Fleming,* No. 813. In those cases orders similar in character to Order No. 45, issued under identical or indistinguishable regulations, were considered.

In the *Martini* case the regulation involved was identical, and in the *Senderowitz* case the regulation considered was indistinguishable.[7] In both cases the courts expressed the opinion that the orders issued after the suits had been instituted were authorized by the regulations and the Act, and that the issuance of the orders constituted a valid exercise of the Administrator's power. In the case at bar the court below reached a conclusion which is squarely contrary to those reached by the courts in the *Martini* and *Senderowitz* cases, since it held that neither the Act nor the regulation authorized the order. The nature of the conflict is set forth in greater detail in the memoranda filed by the Government in those two cases and need not be repeated here. We submit that resolution of the conflict is sufficiently important to warrant review of the instant case by this Court, irrespective of the question discussed in the Government's memoranda in those cases as to the jurisdiction of the circuit courts of appeals to reach the merits of the problem.

The decision is also in conflict with the principles enunciated in *Addison* v. *Holly Hill Fruit Prod-*

[7] The court below in its opinion on rehearing noted that here the seller had not filed the required application with the Administrator (R. 341), a fact which might serve to differentiate the *Senderowitz* case, although the report there was not filed until after the sales had been made and after an enforcement action had been begun. Even if this difference were material, it would not apply to the *Martini* case since no application was ever submitted by that seller.

*ucts Inc.*, 322 U. S. 607; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; and *El Dorado Oil Works* v. *United States*, 328 U. S. 12. For example, in *Addison* v. *Holly Hill Fruit Products, Inc., supra,* this Court held invalid the definition of "area of production" promulgated by the Administrator of the Wage and Hour Division and remanded the case to the district court with instructions to hold it until a valid definition was promulgated, which was then to be applied retroactively to the determination of the pending lawsuit. The court below attempted to distinguish the case at bar from the *Addison* case on the ground that the definition of "area of production" was a "legislative problem," "the determination of which Congress had expressly delegated to the Administrator of the Wage and Hour Division." Price fixing, however, is equally a "legislative problem," which Congress expressly delegated to the Administrator. Here the administrative agency, exercising broad powers delegated by the Congress, reserved a certain area (Rule 3 determinations) for its own specific action. Thus the case at bar would seem to be no different from the *Addison* case in which the Congress had specifically delegated the solution of a particular problem to an administrative agency. Whether, as an original question, the district court is as competent as is the Administrator to determine the level of maximum prices established by the regulation is of no importance. The deciding factor is that the

function of determining respondents' dollars-and-cents maximum prices, which the Administrator reserved for his own determination, was clearly a part of the legislative process responsibility for which was delegated to him by the Act, and under the decisions of this Court, cited above, it is beyond the province of the courts to determine such matters *de novo*.

2. (a) The holding of the court below that the regulation (Rule 3, i. e., Sections 1420.13 (c) of MPR 193 and 1499.3 (c) of the GMPR, infra, pp. 32, 37) did not authorize the issuance of Order No. 45 is clearly erroneous. The court failed to give effect to the express provision of the Regulation that a seller could transmit the in-line prices into dollars-and-cents terms only by a method prescribed by the Administrator. Its disregard of this provision led it to interpret the Regulation as itself prescribing ceilings under Rule 3 without any need for administrative action. But we think it clear that the Regulation contemplated that a seller would apply to the Administrator for such method before he made sales of the particular commodity.

Obviously, the Administrator, in issuing the Regulation, did not intend that a seller should be permitted to nullify the authority reserved to the Administrator under Rule 3 to specify the method of determining dollars-and-cents prices by wilfully refusing to apply to the Administrator for such a method. In the circumstances, the only reason-

able construction of the Regulation is that it authorizes the issuance of implementing orders at any time in situations where a seller unlawfully fails to make the required application before making sales of the commodity involved. The Administrator's interpretation of his own Regulation to this effect is entitled to great weight. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. To construe the Regulation otherwise would, as held by the Circuit Court of Appeals for the Ninth Circuit in the *Martini* case, *supra*, permit sellers, by a flouting of the regulations, to make it impossible for the prescribed procedure to be followed. Hence, the construction placed by the court below on the Regulation, to the effect that the Regulation did not authorize the issuance of Order No. 45 in the absence of an application by the respondents, is plainly unsound.

(b) The holding below that the Act did not authorize the issuance of Order No. 45, on the ground that the order did not effectuate the purposes of the Act, is also without legal foundation.

Section 2 (a) of the Act, *infra,* pp. 21–24, authorizes the Administrator by regulation or order, to establish such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. The broad, general purpose of the Act, set forth in Section 1 (a) thereof, is to stabilize prices. Section 2 (c) of the Act, *infra,* p. 24, provides that

any regulation or order under Section 2 "may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act." Thus, the Administrator was authorized to devise methods of controlling prices which would be appropriate to particular situations.

In exercising the broad authority conferred upon him by the Act, the Administrator issued the GMPR and MPR 193, which were freeze-type regulations, that is, they did not of themselves specify particular sellers' maximum prices in dollars-and-cents terms. Rules 1 and 2, as we have shown, provided for maximum prices for sellers who had sold the same or a similar commodity during March 1942 or who had close competitors selling such commodities. See pp. 4–5, *supra*. There still remained, however, a number of sellers who did not fall within these categories. Rule 3 provided for this class by establishing as the maximum price in such cases a price "in line" with the "level" of maximum prices otherwise established by the Regulation. Because most industries are characterized by non-uniform pricing practices, the determination of the "level" of prices charged by an industry during a specified period and of a price "in line" with such "level"

733276—47——3

requires the gathering and analysis of statistical data and the exercise of judgment and discretion, a task which Congress delegated to the Administrator.

It was these determinations, therefore, which the Administrator reserved for himself, in order best to effectuate the purposes of the Act. Thus orders like Order 45 were an integral and vital part of the freeze-type price control system established by the GMPR and MPR 193 prior to the time of respondents' sales. Whether such orders effectuated the purposes of the Act must be determined not by reference to the time when they were issued, as the court below fallaciously assumed, but rather by what they did in the context of the whole regulatory scheme. The initial fundamental question is not whether Order 45 by itself, effectuated the purposes of the Act, but whether Rule 3 effectuated these purposes. If Rule 3 did so, and there can be little question that it did, then so did Order 45 because Rule 3 could be effective only if implemented by orders of this character. Whether such an order was issued on application by the seller[8] or on the Administrator's own initiative, or before or after

[8] The court's theory that by not filing an application, respondents elected to have the enforcement court determine their in-line dollars-and-cents maximum prices is refuted by the fact that the reason given by respondents for not filing applications was that they thought their sales of the bulk whiskey were not subject to any price control (18, 29).

institution of an enforcement suit, would seem to be wholly irrelevant to the question of whether the framework of price control envisaged by the freeze-type regulation—which required for its completeness Rule 3 and its implementing orders—effectuated the purposes of the Act.

(c) Although the court in its opinion on the petition for rehearing (R. 341) indicated that its decision was based on other grounds, in its original opinion (R. 319), the court below expressed doubt as to the constitutionality of the Act should it be construed as authorizing the issuance of Order No. 45, on the theory that the Act so construed would authorize an encroachment upon the judicial power and a violation of the due process of law clause of the Fifth Amendment. For the reasons set forth in the Memorandum filed in behalf of the respondent in the *Senderowitz* case, pp. 10–12, we do not believe that orders such as Order No. 45 are violative of any constitutional provisions.

3. The decision of the court below that Order 45 was not authorized either by the applicable Regulation or by Section 2 of the Act gives rise to a question of great importance to the continuing OPA enforcement program which, we respectfully submit, should be reviewed by this Court, particularly since the decision comes from the Emergency Court of Appeals which has exclusive jurisdiction to consider the validity of said orders.

Orders of the type of those issued under Rule 3 play an important part in the effective administration of the Act, and a great many treble-damage actions involving such orders are pending in the district courts. A recent survey indicates that there remain approximately 398 such actions involving over 18 million dollars, of which over 200 involve orders that were issued subsequent to the filing of complaints in district courts under Section 205 (e) of the Act.

Under the doctrine announced by the court below, if sellers fail to comply with the requirements that they first apply to the Administrator, the district courts will be required to find what were the sellers' proper maximum prices in dollars-and-cents terms under regulations containing provisions like Rule 3, even though the regulatory scheme clearly contemplated that such determinations would be made by the Administrator, and were actually made by him. The administrative task of making these determinations has, in the main, long since been completed. To require the Administrator to begin all over again by sending economists and business specialists into numerous district courts throughout the country to offer expert oral testimony in support of the Administrator's burden of proving the sellers' proper dollars-and-cents maximum prices, would impose an onerous burden upon the Administrator's present staff that might well be beyond its capabilities. This would, no doubt,

result in permitting many sellers to escape entirely the consequences of their violation of the law, and, in any event, it would permit defendants in treble-damage cases to gain an advantage from their own wilful omissions.

## CONCLUSION

It is, therefore, respectfully submitted that this petition for writs of certiorari should be granted.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*

CARL A. AUERBACH,
*General Counsel,*
*Office of Price Administration,*
*Office of Temporary Controls.*

FEBRUARY 1947.

## APPENDIX

1. The pertinent provisions of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

> SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary

cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

* * * * *

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are gen-

erally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided,* That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or

both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may pro-

vide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price

schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 201. (d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

* * * * *

SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

* * * * *

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceed-

ings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested by enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order,

or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule

is not in accordance with law, or is arbitrary or capricious.

* * * * *

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges whichever is greater if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a

commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

* * * * *

2. (a) Section 1420.13 of Maximum Price Regulation No. 193, as in effect during January 1943 (7 F. R. 6006):

§ 1420.13 *Maximum prices for domestic distilled spirits—(a) Determination of maximum prices generally.*—The seller's maximum price for domestic distilled spirits shall be the seller's maximum price established under § 1499.2 (a) of the General Maximum Price Regulation, plus the following additions:

(1) *Manufacturers may add:*

(i) The difference between the weighted average cost to the manufacturer at his

plant during the period from April 1, 1942 through June 30, 1942 of a quantity of high wines equal to the quantity of high wines used in the manufacture of the domestic distilled spirits to be priced and the weighted average cost to such manufacturer at his plant during the period from January 1, 1942 through March 31, 1942 of the same quantity of neutral spirits: *Provided,* That if the manufacturer increased his price during March 1942, the amount of such increase shall be subtracted from the adjustment permitted hereunder unless the manufacturer files with the Office of Price Administration a statement in affidavit form setting forth facts showing that such increase was not made to offset the increased cost of using high wines: *Provided further,* That the amount of such increase shall be subtracted from the adjustment permitted hereunder regardless of the filing of any such statement if, within 15 days of the receipt thereof, the Price Administrator shall so notify the manufacturer in writing.

(ii) The amount of the tax imposed upon any manufacturer under section 2800 (a) (5) of Title 26 of the U. S. C. A.: *Provided,* That the manufacturer's maximum price for the domestic distilled spirits to be priced established under § 1499.2 (a) of the General Maximum Price Regulation does not reflect payment of such tax.

(iii) The amount of any new tax or any increase in an existing tax imposed upon the manufacturer after March 31, 1942 with respect to the domestic distilled spirits to be priced by any statute of the United States or statute or ordinance of any State

or subdivision thereof: *Provided,* That such amount has been paid directly by the manufacturer.

(2) *Sellers, other than manufacturers, may add:*

(i) The difference between the maximum price established for the seller's supplier under the General Maximum Price Regulation with respect to the domestic distilled spirits to be priced and the maximum price established for the seller's supplier under this Maximum Price Regulation No. 193 with respect to such domestic distilled spirits.

(ii) The amount of any new tax or any increase in an existing tax imposed upon the seller after March 31, 1942, with respect to the domestic distilled spirits to be priced by any statute of the United States or statute or ordinance of any State or subdivision thereof: *Provided,* That such amount has been paid directly by the seller.

In establishing their maximum prices hereunder, sellers at retail may round such prices to the nearest full cent.

(3) *Notification.*—On or before August 16, 1942, every seller, other than sellers at retail, shall notify each of its customers in writing of the difference between such seller's maximum price under the General Maximum Price Regulation and such seller's maximum price under this Maximum Price Regulation No. 193 for each item of domestic distilled spirits ordinarily sold by such seller to such customer.

(b) *Determination of maximum prices by reference to maximum prices of most closely competitive seller.*—If the seller's maximum price for the domestic distilled

spirits to be priced cannot be determined under paragraph (a) of this section, the seller's maximum price for such domestic distilled spirits shall be the maximum price established under paragraph (a) of this section for the most closely competitive seller of the same class for such domestic distilled spirits or for the similar commodity most nearly like it (as such term is defined in § 1499.2 of the General Maximum Price Regulation) for sales to a purchaser of the same class.

(c) *Determination of maximum prices under § 1499.3 of the General Maximum Price Regulation.*—If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) or paragraph (b) of this section, the seller's maximum price for such domestic distilled spirits shall be determined in accordance with § 1499.3 of the General Maximum Price Regulation.

(b) Sections 1499.2 and 1499.3 of the General Maximum Price Regulation, as in effect during January 1943 (7 F. R. 5484, 6615, 6794, 7093, 10155):

§ 1499.2 *Maximum prices for commodities and services; general provisions.*—Except as otherwise provided in this regulation, the seller's maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March 1942:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller's maximum price cannot be determined under paragraph (a),

the highest price charged during March 1942 by the "most closely competitive seller of the same class":

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

*Highest Price Charged During March 1942*

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller during March 1942 shall be:

(a) The highest price which the seller charged for a commodity "delivered" or service "supplied" by him during March 1942 to a "purchaser of the same class"; or

(b) If the seller made no such delivery or supplied no such service during March 1942, his highest offering price for delivery or supply during that month to a purchaser of the same class; or

(c) If the seller made no such delivery or supplied no such service and had no such offering price to a purchaser of the same class, the highest price charged by the seller during March 1942 to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers: *Provided, however,* That (1) If before April 1, 1942, the seller raised his prices for a commodity or service to all his classes of purchasers (or to all his classes of purchasers except those to whom he was bound to make delivery or supply during March 1942 pursuant to a firm commitment made before the price rise) and

(2) If during March 1942 he delivered the commodity or supplied the service at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery or supply was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March 1942 shall be deemed to be:

(i) The seller's increased offering price to such class of purchasers for delivery or supply during March 1942, or

(ii) If the seller had no such increased offering price to that particular class of purchasers, the highest price charged during March 1942 to a purchaser of a different class, adjusted to reflect:

(a) The seller's customary differential in price between the two classes of purchasers; or

(b) If the seller had no such customary differential, the actual percentage differential in price between the two classes of purchasers which existed at the time the seller last entered into a commitment, or, if he did not enter into such a commitment, last submitted an offering price, for delivery or supply to a purchaser of that particular class during March 1942.

No seller shall evade any of the provisions of this General Maximum Price Regulation by changing his customary allowances, discounts or other price differentials.

No seller shall require any purchaser, and no purchaser shall be permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any

commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

*Similar Commodities or Services*

One commodity shall be deemed similar to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed similar to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

*Special Provisions*

The maximum prices established by this section for certain commodities or services or in certain transactions may be modified by supplementary regulation issued under this section.

§ 1499.3. *Maximum prices for commodities and services which cannot be priced under § 1499.2.*—The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this Gen-

eral Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

(a) In the case of a "sale at wholesale or retail" of a commodity, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under section 2 of this Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his "replacement cost" of that commodity; and (3) shall multiply the percentage so obtained by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the "appropriate field office of the Office of Price Administration" upon a form, duly filled out, copied from the form contained in Appendix A of this Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

(b) In the case of a sale other than at wholesale or retail of a commodity, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the Office of Price Administration in Washington, D. C., an application setting forth (1) a description in detail of the commodity for which a maximum price is sought;

and (2) a statement of the facts which differentiate such commodity from other commodities delivered during March, 1942 by such seller and by other competitive sellers of the same class. Such authorization will be given in the form of an order prescribing a method of determining the maximum price for the applicant or for sellers of the commodity generally, including purchasers for resale, or for a class of such sellers.

(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under § 1499.2 or § 1499.3 (a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price.

(d) In the case of a sale of a commodity the price for which includes the supply of

a service of substantial value and which cannot be priced under paragraph (a) of this section, or in the case of a sale of a service, the maximum price shall be a price determined by the seller by applying the first applicable pricing method of the pricing methods stated in § 1499.102 of Maximum Price Regulation No. 165, as amended.

(c) Order No. 45, issued June 13, 1945 (10 F. R. 7206):

For the reasons set forth in the opinion issued simultaneously herewith and filed with the Division of the Federal Register, and pursuant to Section 1499.3 (c) of the General Maximum Price Regulation; *It is Ordered:*

(a) (1) The maximum price for sales of bulk domestic whiskey, evidenced by warehouse receipt or otherwise, by the persons named in paragraph (b) hereof, for sales made during the month of January, 1943 (in the event that any such persons made such sales), shall be the maximum price established by that person in accordance with section 1420.13 (a) or (b) of Maximum Price Regulation 193.

(2) In the event that any person named in paragraph (b) hereof is unable to establish a maximum price for his sales of bulk domestic whiskey in accordance with sub-paragraph (1) above, the maximum price for such sales during the month of January, 1943 shall be the appropriate amount set forth in section 1420.13 (g) of Maximum Price Regulation 193 in accordance with the age of the whiskey being priced.

(3) Section 1420.10 (a) (5), (6) and (7) and section 1420.13 (e), (f), (g), (h) and

(i) of Maximum Price Regulation 193, as in effect on February 3, 1943, are incorporated herein by reference.

(b) This order shall apply to all sales of bulk domestic whiskey made during the month of January 1943 by the following persons, in the event that any such persons made such sales:

A. J. Cummins, W. M. Morrison, Louis J. Newman, Earl J. Mock—individually and as officers of the Cummins Distilleries Corporation.

A. J. Cummins, W. M. Morrison, Louis J. Newman, Roy St. Lewis, Hiram Neuwoehner, John W. Smart—individually and as directors of Cummins Distilleries Corporation.

W. M. Morrison, Max Waldman, William Wagner—individually and as the Cummins Stockholders' Distribution Committee.

Morrel D. Klein, and Robert R. Appel—individually and d/b/a Klein and Appel.

John W. Smart, and William Wagner—individually and d/b/a Smart and Wagner.

Allan L. Carter, Jr., C. Prevost Boyce, Henry C. Evans, William T. Childs, C. Newton Kidd, Milton S. Trost, Robert S. Lansburgh, William K. Barclay, Jr., Leroy A. Wilbur, Edward J. Armstrong—individually and d/b/a Stein Bros. and Boyce.

Farmers National Bank of Lebanon, Kentucky, Executor of the estate of George W. Dant.

G. C. Collins, Jr., Christine Hunt Collins, Louis J. Newman, Lillian Newman, W. M. Morrison, Marcella W. Morrison, David J. Williams, T. E. Spragens, J. D. Clark, D. P. Newell, Mrs. Jessie S. Miner, James Burt Miner, Mrs. Anna Bell Bick-

ett, Adolph F. Rupp, Phil E. Lahman, Mrs. Gladys G. Minton, Clara McCoy, John McCoy.

Stanley McCoy, Mary Lee Hiner, Hiram Neuwoehner, Edwin C. Willis, R. J. Haury, A. J. Cummins, Yancey Lee Cummins, Roy St. Lewis, Edward J. Miller, Adolph Hirsch, Russell Ebinger, Adolph H. Gossmahn, Mrs. Marcellus G. Mature.

(c) This order may be revoked or amended by the Price Administrator at any time.

(d) This order shall become effective immediately.

(e) Issued this 13th day of June 1945.

(S) Chester Bowles,
CHESTER BOWLES,
*Administrator.*

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Supreme Court, U.S.
FILED
MAR 28 1947

**Nos. 1080 and 1082.**

IN THE

# Supreme Court of the United States

October Term, 1946

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PHILIP B. FLEMING, Temporary Controls Administrator, - - - - - - Petitioner,

*versus*

CHRISTINE COLLINS, Et Al., - - - Respondents.

PHILIP B. FLEMING, Temporary Controls Administrator, - - - - - - Petitioner,

*versus*

WILLIAM M. MORRISON, Et Al., - - Respondents.

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On Petition for Writs of Certiorari to the United States Emergency Court of Appeals.

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## MEMORANDUM FOR RESPONDENTS.

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# INDEX.


PAGE

**Opinions Below** ..... 1

**Jurisdiction** ..... 2

**Questions Presented** ..... 2–4

**Statute and Regulation Involved** ..... 4

**Statement** ..... 4–8

**No Conflict Exists and Decision Below Is Supported By Other Grounds** ..... 8–11

I. Section 1499.3(c) of the General Maximum Price Regulation, as in effect during January, 1943, did not authorize issuance of Order No. 45 ..... 11–13

II. The Emergency Price Control Act did not authorize issuance of Order No. 45 ..... 14–19

III. Order No. 45 is violative of Article I, Section 9, Clause 3, of the Federal Constitution. 19–31

IV. Order No. 45 is violative of the due process clause of the Fifth Amendment to the Federal Constitution ..... 31–33

V. Order No. 45 deprives respondents of their rights under Sections 203(a) and 204(a) of the Emergency Price Control Act ..... 33–36

VI. Other decisions relied upon by petitioner are clearly inapplicable because they did not involve any ex post facto regulation imposing pecuniary penalties ..... 36–39

VII. Erroneous dictum in opinion of Emergency Court is no ground for grant of certiorari... 40–45

**Conclusion** ..... 45

**Appendix** ..... 46–47

## CITATIONS.

**Cases:**


| | PAGE |
|---|---|
| *Addison* v. *Holly Hill Fruit Products Corp.*, 322 U. S. 607 | 36 |
| *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 284 U. S. 370 | 16, 17 |
| *Ash Sheep Co.* v. *United States*, 252 U. S. 159 | 39 |
| *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U. S. 301 | 18 |
| *Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647 | 27, 29 |
| *Bowles* v. *Barde Steel Co.*, 164 Pac. (2d) 692 | 21 |
| *Bowles* v. *Farmers National Bank of Lebanon, Kentucky*, 147 F. (2d) 425 | 20 |
| *Bowles* v. *Griffin*, 151 F. (2d) 458 | 30 |
| *Bowles* v. *Heckman*, 64 N. E. (2d) 660 | 21 |
| *Bowles* v. *Johnson*, 3 P C, par. 52625, decided Jan. 30, 1947 | 9 |
| *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 | 14 |
| *Bowles* v. *Willingham*, 321 U. S. 503 | 16, 18 |
| *Boyd* v. *United States*, 116 U. S. 616 | 26 |
| *Calder* v. *Bull*, 3 Dallas 386 | 24, 27, 30 |
| *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 | 20 |
| *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8 | 32 |
| *Cohen Grocery Co.* v. *United States*, 255 U. S. 81 | 42 |
| *Conklin Pen Co.* v. *Bowles*, 152 F. (2d) 764 | 13 |
| *Coolidge* v. *Long*, 282 U. S. 582 | 33 |
| *Cummins Distilleries Corp.* v. *Brown*, 56 F. Supp. 941 | 20 |
| *El Dorado Oil Works* v. *United States*, 328 U. S. 12 | 37 |
| *Ettor* v. *Tacoma*, 228 U. S. 148 | 33 |
| *Fletcher* v. *Peck*, 6 Cranch 87 | 25 |
| *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422 | 37 |
| *Graham & Foster* v. *Goodcell*, 282 U. S. 409 | 30 |

PAGE

*Kentucky Union Co.* v. *Kentucky*, 218 U. S. 140.... 27
*Kraus & Bros., Inc.*, v. *United States*, 327 U. S. 614 13, 14, 42
*Kring* v. *Missouri*, 107 U. S. 221..... 26
*Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129..... 16
*Marshall* v. *Vicksburg*, 15 Wall. 146..... 39
*Martini* v. *Fleming*, Docket No. 813 (pending on certiorari) . . ..... 8
*Matheny* v. *Porter*, 158 F. (2d) 478..... 31
*Miller* v. *United States*, 294 U. S. 435..... 16
*Mulford* v. *Smith*, 307 U. S. 38..... 31
*Nichols* v. *Coolidge*, 274 U. S. 531..... 33
*Ochoa* v. *Hernandez y Morales*, 230 U. S. 139..... 33
*Parker* v. *Fleming*, No. 80, Sup. Ct. U. S., decided Jan. 20, 1947..... 33
*Porter* v. *Hirahara*, 3 P C, par. 52628, decided Jan. 29, 1947 . . ..... 9
*Porter* v. *Kramer*, 156 F. (2d) 687..... 8
*Porter* v. *The Sherwood Distilling Co.*, 156 F. (2d) 264 . . ..... 13
*Porter* v. *Warner Holding Co.*, 328 U. S. 395..... 19
*Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226..... 32
*Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80..... 10
*Senderowitz* v. *Fleming*, Docket No. 677 (pending on certiorari) . . .....8, 27, 32, 40
*Smith* v. *Hoboken R. R., Warehouse & S. S., Connecting Co.*, 328 U. S. 123..... 38
*Stearns, R. H. Co.* v. *United States*, 291 U. S. 54... 38
*Testa and Fleming* v. *Katt*, Sup. Ct., U. S., No. 431, March 10, 1947..... 21
*Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50.... 44
*Thompson* v. *Texas-Mexican Ry. Co.*, 328 U. S. 134 38
*United States* v. *Chouteau*, 102 U. S. 603.....20, 26
*United States* v. *Dietrich*, 126 Fed. 676..... 27

PAGE

*United States* v. *Fox*, 95 U. S. 670..... 26
*United States* v. *Heinszen & Co.*, 206 U. S. 370..... 32
*United States* v. *Hughes*, 8 Ben 29, 26 Fed. Cas. No. 15,416 . . ..... 26
*United States* v. *Morgan*, 307 U. S. 183..... 18
*Untermyer* v. *Anderson*, 276 U. S. 440..... 33
*Watson* v. *Mercer*, 8 Peters 88..... 26
*William Danzer & Co., Inc.*, v. *Gulf & Ship Island Railroad Company*, 268 U. S. 633..... 32
*Yakus* v. *United States*, 321 U. S. 414.....14, 18

**Statutes:**

Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. IV 924)—

Section 2(a) . . .....14, 16, 19, 41
Section 2(b) . . ..... 4, 16
Section 2(c) . . ..... 16
Section 2(d) . . ..... 4, 17
Section 2(g) . . ..... 17
Section 4(a) . . ..... 41
Section 201(d) . . .....17, 18
Section 202(a) . . ..... 18
Section 202(a) . . .....3, 8, 33, 34, 35
Section 204(a) . . .....3, 8, 33, 34, 35, 40
Section 204(d) . . .....2, 8, 35
Section 205(a) . . .....4, 19, 20
Section 205(b) . . ..... 4, 41
Section 205(e) . . .....3, 14, 19
20, 21, 22, 25, 26, 30, 31, 32, 35, 37, 41

**Federal Constitution:**

Article 1, Section 9, Clause 3.....8, 19, 23, 26, 31, 35, 39
Fifth Amendment . . .....8, 31, 33, 34

**General Maximum Price Regulation:**

PAGE

Section 1499.2 (7 Fed. Reg. 3153).....5, 11, 12
Section 1499.3 (7 Fed. Reg. 7093)..5, 11, 40, 41, 42, 44, 45
Section 1499.3(c) (7 Fed. Reg. 7093).....2, 6, 7, 8, 11, 13, 23, 35, 39

**Maximum Price Regulation 169**..... 15

**Maximum Price Regulation 188**..... 14

**Maximum Price Regulation 193**.....7, 13, 22, 33

**Order No. 45 issued under Section 1499.3(c) of the General Maximum Price Regulation**.....3, 7, 8, 9, 11, 13, 18, 29, 30, 31, 33, 34, 38, 42

**Revised Procedural Regulation No. 1, Section 24**..4, 18, 33

IN THE

# Supreme Court of the United States

October Term, 1946

---

**No. 1080.**

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, - - - - - *Petitioner,*

*v.*

CHRISTINE COLLINS, ET AL., - - *Respondents.*

**No. 1082.**

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, - - - - - *Petitioner,*

*v.*

WILLIAM M. MORRISON, ET AL., - *Respondents.*

---

*On Petition for Writ of Certiorari to the United States Emergency Court of Appeals.*

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## MEMORANDUM FOR RESPONDENTS.

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### OPINIONS BELOW.

Neither the original opinion (R. 310) nor the opinion on petition for rehearing (R. 340) of the Emergency Court of Appeals have been reported.

## JURISDICTION.

The judgments of the Emergency Court of Appeals holding Order No. 45 to be invalid were entered on January 2, 1947 (R. 328-329) and the judgment overruling the petition for rehearing was entered on January 30, 1947 (R. 342). The petition for writs of certiorari was filed on February 28, 1947. Jurisdiction of this Court rests on Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 23 as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV 924, making applicable Section 240 of the Judicial Code as amended (28 U. S. C. 347).

## QUESTIONS PRESENTED.

1-A. May the Price Administrator substitute his penalty for the penalty prescribed by the Price Act where a sale is made when no applicable ceiling price exists, and the seller fails to apply to the Administrator to fix such a price?

2-A. Whether Section 1499.3(c) of the General Maximum Price Regulation in effect during January, 1943, authorized prescription by the Price Administrator on June 13, 1945, of specific maximum prices applicable to prior sales made by respondents in January, 1943, in the absence of any application by respondents to the Price Administrator for prescription of any maximum prices.

2. Whether Section 2(a) or any other section of the Emergency Price Control Act authorized the prescription by the Price Administrator on June 13, 1945, of specific maximum prices applicable to prior sales made by respondents in January, 1943.

3. Whether specific maximum prices prescribed by the Price Administrator on June 13, 1945, for application to prior sales by respondents in January, 1943, violate the *ex post facto* clause of Article I, Section 9, Clause 3, in the Federal Constitution if attempted to be used to measure "overcharges" in an enforcement action instituted under Section 205(e) of the Act and now pending against respondents in a district court.

4. Whether specific maximum prices prescribed by the Price Administrator on June 13, 1945, for application to prior sales by respondents in January, 1943, violate the due process clause of the Fifth Amendment to the Federal Constitution if attempted to be used to measure "overcharges" in an enforcement action instituted under Section 205(e) of the Price Act and now pending against respondents in a district court.

5. Whether Order No. 45 was illegal and void because it deprived respondents of all rights to protest, under Section 203(a) of the Emergency Price Control Act, the validity of the *measure* of the inchoate prices set out in the Order and to appeal, under Section 204(a) of said Act, from an adverse ruling on any protest since said Order No. 45 and the Opinion accompanying same merely purported to establish conditional, in-

choate ceiling prices which might become "applicable" *only if* certain future findings were made by the District Court during an enforcement trial with the result that respondents were not, within the meaning of Section 203(a) of the Act, "subject to" any definite prices upon the issuance of Order No. 45 and said Order did not immediately, substantially and adversely affect respondents or "prohibit" or "require" action by them within the meaning of Section 24 of Revised Procedural Regulation No. 1.

## STATUTE AND REGULATION INVOLVED.

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (hereinafter sometimes referred to as the "Act"), and of the General Maximum Price Regulation (hereinafter sometimes referred to as "G.M.P.R.") are set forth in the appendix to the application for certiorari, except Sections 2(b), 2(d), 205(a) and 205(b) of the Act which are contained in an appendix hereto, *infra* pp. 45 to 46.

## STATEMENT.

Prior to December 1, 1942, respondents were the owners and holders of shares of common stock in Cummins Distilleries Corporation, a Delaware corporation engaged in the production and storage of bourbon whiskey in Kentucky (R. 76-92). On December 24, 1942, the corporation was dissolved by a vote of the requisite number of shares (R. 92-96). As part of the

plan of liquidation, warehouse receipts for approximately 51,000 barrels of bourbon whiskey were distributed to the common stockholders, including respondents, by delivery to an authorized stockholders' committee. The certificate of corporate dissolution issued December 31, 1942. Beginning January 4, 1943, and ending January 9, 1943, the stockholders' committee sold the warehouse receipts and collected the proceeds of sale (R. 12, 45).

In January, 1943, M.P.R. 193 was in effect (R. 188). Section 1420.13(a) and (b) of M.P.R. 193 (R. 192-193) did not apply to the sales because respondents made no sales of warehouse receipts in March, 1942, and there were no more closely competitive sellers of the same class whose prices could have been used by respondents as a basis for the establishment of ceiling prices for their sales in January, 1943 (R. 2, 34).

Section 1420.13(c) of M.P.R. 193 provided as a third pricing method, in case neither Section 1420.13 (a) nor (b) of M.P.R. 193 could be applied, that "the seller's maximum price for such domestic distilled spirits shall be determined in accordance with Section 1499.3 of the General Maximum Price Regulation" (R. 194). Section 1499.3 of the G.M.P.R., as amended and in force in January, 1943, provided as follows (R. 216-218):

> "1499.3. *Maximum prices for commodities and services which cannot be priced under §1499.2.* The seller's maximum price for a commodity or service which cannot be priced under §1499.2 of this General Maximum Price Regulation shall be

a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. *Such price shall be determined by the seller in accordance with the following procedures:*

* * * * * * *

"(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price *determined by the seller after specific authorization* from the Office of Price Administration or any duly authorized officer thereof. A seller *who seeks an authorization* to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under §1499.2 or §1499.3(a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. *Such authorization will be given in the form of an order prescribing a method of determining the maximum price.*" (Emphasis supplied.)

Before making their sales in January, 1943, respondents did not file any application with the Price Administrator under Section 1499.3(c) of G.M.P.R. to have him authorize any method whereby respondents

could determine ceiling prices for their whiskey. No such application was ever filed by respondents, and they denied any power of the Price Administrator to prescribe ceiling prices on his own motion (R. 16-18) after the consummation of the sales.

On May 27, 1943, the Price Administrator filed a complaint for treble damages in the United States District Court for the Western District of Kentucky against the corporation and respondents alleging that the whiskey of respondents had been sold in excess of the maximum prices established by Section 1420.13(b) of M.P.R. 193 for their most closely competitive sellers of the same class (R. 59-72). The action is still pending.

Apparently fearing that he might be unable to establish a basis for determining respondents' maximum prices under Section 1420.13(b) of M.P.R. 193, the Price Administrator, on June 13, 1945—over two years after the enforcement action had been filed—issued Order No. 45 under purported authority of Section 1499.3(c) of the G.M.P.R. (R. 185-186), and attempted thereby to establish maximum prices for the prior sales of respondents made in January, 1943. Order No. 45 was not issued on respondents' application as contemplated by Section 1499.3(c) of the General Maximum Price Regulation.

Respondents filed their protests to Order No. 45 (R. 1, 32) basing same on the grounds that the Order was not authorized by Section 1499.3(c) of the G.M.P.R., under which it purported to be issued, nor by Sec-

tion 2 of the Price Act; respondents raised the further issues that Order No. 45 was invalid because in violation of the *ex post facto* clause of Article I, Section 9, Clause 3, of the Federal Constitution and was also violative of the due process clause of the Fifth Amendment to the Federal Constitution. Also, respondents contended that the Order was invalid because inconsistent with Sections 203(a), 204(a) and 204(d) of the Price Act. After denial of the protests by the Price Administrator (R. 146) appeals were perfected to the Emergency Court (R. 223, 274), which ruled that Order No. 45 was invalid because neither authorized by Section 1499.3(c) of the General Maximum Price Regulation nor by Section 2 of the Price Act (R. 328, 342). The Emergency Court did not pass upon the other grounds of invalidity raised in the protests and in the appeals.

## NO CONFLICT EXISTS AND DECISION BELOW IS SUPPORTED BY OTHER GROUNDS.

Under Section 204(d) of the Emergency Price Control Act only the Emergency Court,[1] as distinct from a District Court or a Circuit Court, may pass upon the validity of such a retroactive price order as Order No. 45. The Emergency Court held Order No. 45 to be invalid because neither authorized by Section 1499.3(c)

[1]In *Senderowitz* v. *Fleming*, No. 677, and *Martini* v. *Fleming*, No. 813 (both pending on applications for certiorari) the United States Circuit Courts of Appeals for the Third and Ninth Circuits had no jurisdiction to pass upon the validity of the retroactive price orders involved in those cases. Neither case can be said to be in conflict with the ruling of the Emergency Court of Appeals in the instant case. In *Porter* v. *Kramer*, 156 F. 2d 687, no constitutional issues were properly before, and none were decided by, the Circuit Court.

of the General Maximum Price Regulation nor by Section 2 of the Act.

In the case at bar, Order No. 45 was issued by the Administrator on his own initiative and without an application therefor having been filed by respondents. In Porter v. The Sherwood Distillery Co., 156 Fed. 2d 264, the United States Circuit Court of Appeals for the Fourth Circuit held the Administrator not entitled to an injunction compelling the filing of the required application to enable him to fix maximum prices on sales already made for the purpose of establishing a basis for recovery of treble damages. Though a different section of the Price Act was involved, fundamental principles identical with those in the case at bar were involved in the Sherwood Distillery case and these two are the only cases involving these principles which have been decided by courts having jurisdiction to decide them. Both have been decided the same way in principle. In this case, the Emergency Court of Appeals has invalidated the retroactive order issued without an application as basis therefor and in the Sherwood Distillery Case the Circuit Court of Appeals held the administrator without legal right to compel the filing of an application to become the basis on which he could fix prices for sales already made for the sole purpose of collecting treble damages in the pending suit.

Petitioner may not even be a proper party to file an application for certiorari. Bowles v. Johnson, 3 P C, 52625, decided January 30, 1947, by the Municipal Court, City of Long Beach, California; Porter v. Hira-

hara, 3 P C, par. 52628, decided January 29, 1947, by United States District Court for Hawaii.

There is no special or important reason why this obviously correct ruling by the Emergency Court should be reviewed. General price control was ended by Congress some time ago and it is the present public policy to abolish the remaining remnant (now reduced to rents, sugar and rice) as speedily as possible. Hence no rule can be laid down that will have continuing prospective effect on the public at large. The admission by petitioner (p 18 of petition) that the Price Administrator issued a number of similar illegal orders only emphasizes the extent to which the latter official exceeded his statutory authority. Certainly, wholesale violations of the Act by the Price Administrator, and his total disregard for elemental principles of constitutional law, are a false basis upon which petitioner may not successfully predicate any claim that a matter of public importance is involved which requires review by this Court of the ruling below invalidating Order No. 45 and adequately protecting the public from high-handed bureaucratic persecution through use of other such illegal orders.

Indeed, even if the writ should be granted, the decision of the Emergency Court must be affirmed under "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct, 'although the lower court relied upon a wrong ground or gave a wrong reason.'" Securities & Exchange Commission v. Chenery Corp., 318 U. S. 80, 88. In addition to the grounds properly relied upon in the

opinion of the the Emergency Court its ruling invalidating Order No. 45 is obviously correct for three reasons which will be developed *after* an elaboration of the two grounds relied upon by the Emergency Court to support its ruling.

**I. Section 1499.3(c) of the General Maximum Price Regulation, in Effect During January, 1943, Did Not Authorize Issuance of Order No. 45.**

Order No. 45 states in the first paragraph thereof that it is issued "pursuant to Section 1499.3(c) of the General Maximum Price Regulation" (R. 185).[2]

Section 1499.3 of the General Maximum Price Regulation as in effect in January, 1943 (7 Fed. Reg. 7093; R. 216-218), when the sales in question were made by respondents, provided three *procedures* in subparagraphs (a), (b) and (c) for determining ceiling prices for commodities which could not be priced under Section 1499.2 of the General Maximum Price Regulation. Subparagraphs (a) and (b) need not be considered because Order No. 45 only purports to be issued pursuant to Section 1499.3(c) of the General Maximum Price Regulation. Said subparagraph (c) in effect during January, 1943, provided (R. 216-217):

> "(c) In the case of a *sale at wholesale or retail* of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall

[2]In their protests, par. 2(f) and (g) (R. 4, 36); par. 3(e) and (f) (R. 6, 38) and par. 6 (R. 7, 39), and in their complaints, pages 8, 9, 11 and 13 (R. 231-232, 234-235, 283-284, 285-286), the complainants urged that Order No. 45 was *not* authorized under the Emergency Price Control Act or any regulation issued thereunder, *including Section 1499.3(c) of the General Maximum Price Regulation.*

be a *price determined by the seller* after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who *seeks an authorization* to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under §1499.2 or §1499.3(a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. *Such authorization* will be given in the form of an order *prescribing a method of determining* the maximum price." (Emphasis supplied.)

It will be noted that said subparagraph (c) of Section 1499.3, as in effect during January, 1943, is only applicable "in the case of a sale at wholesale or retail of a commodity which cannot be priced under subparagraph (a)."[3] In such event "the maximum price shall be a price *determined by the seller* after specific authorization from the Office of Price Administration." "Such authorization will be given in the form of an *order prescribing a method of determining the maximum price.*" (Emphasis supplied.) The subparagraph further provides that "a seller who seeks an

[3]We concede the commodity here involved could not be priced under subparagraph (a).

authorization to determine a maximum price" shall file an application furnishing specific information, but does *not* require any seller to seek such an authorization. None of the respondents filed any application seeking authorization to determine a maximum price, and the subparagraph *clearly does not authorize petitioner,* of his own motion, *to promulgate retroactive ceiling prices. Cf. Porter* v. *The Sherwood Distilling Co.,* 156 F. 2d 264.

Moreover, Order No. 45 does not attempt to authorize a "method of determining the maximum price" which respondents may use in "determining" a price. On the contrary, said order in subparagraph (a)(1) prescribes ceiling prices, applicable solely to respondents by name, computed in the identical manner previously prescribed in August, 1942, for other sellers under Section 1420.13 (a) and (b) of M.P.R. 193 (R. 185); *and* Order No. 45 in subparagraph (a) (2) (R. 185) prescribed for respondents by name the dollars and cents prices previously prescribed in Section 1420.13(g) of M.P.R. 193 by Amendment No. 4 thereof, effective February 3, 1943 (R. 200), after the sales here in question. No sane interpretation of Section 1499.3 (c) of the General Maximum Price Regulation, as in effect during January, 1943, can justify issuance of Order No. 45. There being no basis in fact in the regulation, when sales were made in January, 1943, for issuance of Order No. 45, the order is illegal in its entirety. *Kraus & Bros., Inc.,* v. *United States,* 327 U. S. 614, 621, 622; *Conklin Pen Co.* v. *Bowles,* 152 F. 2d 764.

## II. The Emergency Price Control Act Did Not Authorize Issuance of Order No. 45.

Section 2(a) of the Act provides that, under prescribed conditions, the Price Administrator may establish such maximum prices as in his judgment "will be" generally fair and equitable and "will effectuate" the purposes of the Act. This section contemplates only "prospective" operation of any prices for commodities so established and does not empower the Price Administrator to establish retroactive prices solely as a basis for the collection of penalties on past sales as Order No. 45 attempts illegally to do. This interpretation of Section 2(a) is demanded by Section 205(e) of the Act which authorizes collection of penalties *only* from one who "violates" (present tense) an existing price regulation.

Decisions of the Supreme Court recognize and state that regulations fixing ceiling prices for commodities are issued pursuant to Section 2(a) of the Price Act. Among such decisions are *M. Kraus & Bros., Inc.*, v. *United States*, 327 U. S. 614, 619, in which the Court considered revised M.P.R. 269, and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 411, in which the Court considered M.P.R. 188. In *Yakus* v. *United States*, 321 U. S. 414, the Court said (p. 420):

> "The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by §2(a) and by §1 of the amendatory Act of October 2, 1942 * * * By §2(a) the Administrator is author-

> ized * * * to promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.' "

M.P.R. 169 was before the court in the *Yakus* case. It further said (p. 422):

> "As is required by §2(a) of the Act it [M.P.R. No. 169] was accompanied by a 'statement of considerations involved' in prescribing it."

and (p. 423):

> "The boundaries of the field of the Administrator's permissible action are marked by the statute * * * In short, the purposes of the Act specified in §1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in §2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards * * *."

and (p. 439):

> "Moreover, §2(a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days 'establishing as a maximum * * * the price * * * prevailing with respect to any commodity * * * within five days prior to the date of issuance of such temporary regulations' * * *."

Section 2(b) of the Price Act gives the Administrator the same power with respect to the fixing of prices for rents as Section 2(a) does with respect to commodities. *Bowles* v. *Willingham,* 321 U. S. 503, 513, 514.

Section 2(c) of the Act provides that any regulation or order under Section 2 "may be established in such form and manner, may contain such classifications and differentials, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act * * *." Obviously, Section 2(c) does not enlarge the authority granted the Price Administrator under Section 2(a) to promulgate *only* prices which operate "prospectively." Nothing in Section 2(c) can be interpreted to authorize the promulgation of prices which violate the *ex post facto* and due process clauses of the Federal Constitution. Any order issued by the Price Administrator "to effectuate the purposes of this Act," in order to be valid, must be such an order as comes "within constitutional limits," *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railroad Company,* 284 U. S. 370, 388, and must "be consistent with the statute" and "must be reasonable," *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134. In *Miller* v. *United States,* 294 U. S. 435, the Court said (p. 439):

> "The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears."

Section 2(d) merely authorizes the Price Administrator to issue regulations or orders which "prohibit speculative or manipulative practices * * * or hoarding, in connection with any commodity * * * which in his judgment are equivalent to or are likely to result in price * * * increases * * * inconsistent with the purposes of this Act." This section only authorizes issuance of regulations or orders which operate prospectively, and, obviously, does not empower the Price Administrator to issue retroactive orders which violate the Federal Constitution.

Section 2(g) provides that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." This section clearly means that any valid general order which operates prospectively may contain suitable provisions to prevent its evasion; by no stretch of the imagination can this section be interpreted to authorize the issuance of special or individual price regulations which are violative of the restrictions imposed upon the Congress and administrative agencies of the Government by the Federal Constitution. *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railroad Company,* 284 U. S. 370, 388.

Section 201(d) provides that "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." Necessarily, such "regulations and orders" must not offend constitutional provisions; otherwise, the conten-

tion of the Administrator must be that he was given unbridled license, free from all constitutional restrictions, to do as he pleased, and any such egotistical contention is ridiculous and absurd. Procedural Regulation No. 1, as revised, is an example of the type of regulation and order that may be, and admittedly was, issued under authority of Section 201(d). *Yakus* v. *United States,* 231 U. S. 414, 438; *Bowles* v. *Willingham,* 321 U. S. 503, 508.

Section 202(a) authorizes the Administrator to make studies and investigations, conduct hearings and obtain information "to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations, orders, and price schedules thereunder." Clearly, the power to make studies and investigations, conduct hearings and obtain information does not authorize the Price Administrator to issue a price order such as Order No. 45 which is violative of constitutional provisions.

The above analysis of the various sections of the Price Act clearly shows that Order No. 45 was not authorized by Section 2 or any other section of the Price Act. Order No. 45 is "personal government by a petty tyrant instead of government by law." *Bowles* v. *Willingham,* 321 U. S. 503, 537.

Order No. 45 conflicts with the ruling made in *United States* v. *Morgan,* 307 U. S. 183. There the Court (in discussing its prior decision in *Atlantic Coast Line Railroad Co.* v. *Florida,* 295 U. S. 301) said (pp. 195-196):

> "There, as here, the administrative agency could prescribe rates *only for the future* * * *." (Emphasis supplied.)

The same limitation which applies to the Interstate Commerce Commission and the Secretary of Agriculture also limits the Price Administrator to prescription of ceiling prices "only for the future." Furthermore, Section 2(a) of the Price Act may only be interpreted to authorize "prospective" operation of any prices prescribed for commodities.

### III. Order No. 45 Is Violative of Article I, Section 9, Clause 3 of the Federal Constitution.

An action by petitioner, as Price Administrator, under Section 205(e) of the Price Act, to collect treble damages on non-governmental purchases, is an action to collect "penalties." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, involves the power of a Federal Court in an enforcement proceeding under Section 205(a) of the Price Act to order restitution of rents collected by a landlord in excess of the permissible maximums. The Court said (pp. 401-2) that Section 205(e) establishes the sole means whereby individuals may ascertain their private right to damages and "whereby the Administrator on behalf of the United States may seek damages in the nature of penalties." The Court further said that (p. 402) "restitution * * * is consistent with and differs greatly from the damages and penalties which may be awarded under Section 205(e)"; when the Administrator seeks "restitution"

under Section 205(a), he does not request the Court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under Section 205(e). Thus, this Court recognizes that on non-governmental sales the government can suffer no damage and that an enforcement action brought under Section 205(e) by the Price Administrator is an action to collect penalties. The penalty is a punishment for infraction of the law. *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 240-41. The character of the penalty is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. *United States* v. *Chouteau,* 102 U. S. 603, 611.

An enforcement action against these respondents pending in the United States District Court for the Western District of Kentucky, in which the Price Administrator proposes to use Order No. 45, has been held to be a penalty action by the United States Circuit Court of Appeals for the Sixth Circuit in an appeal from that part of the case involving warehouse receipts owned by George W. Dant, a stockholder, who died after the sales had been made. In the appeal, *Bowles* v. *Farmers National Bank of Lebanon, Kentucky,* 147 F. 2d 425, the decision of the Circuit Court of Appeals affirmed the prior decision by the District Court in *Cummins Distilleries Corp.* v. *Brown,* 56 F. Supp. 941, in holding that the treble damage action involving the sales of the warehouse receipts distributed to the stockholders of Cummins Distilleries Cor-

poration was for the recovery of penalties. After a full analysis of the treble damage provision of the Price Act, and prior decisions establishing rules to determine whether particular statutes award "penalties," the Circuit Court concluded that the manifest purpose of Section 205(e) was to prevent inflationary tendencies sought to be curbed by the Act as a whole through punishment of violations of the statute by payment of penalties to the Administrator. The Court said (p. 428):

> "The exaction established by this statute clearly falls within the classification of penalty."

Penalties paid to the Price Administrator are not a deductible expense under the income tax law. 4 Mertens' Law of Federal Income Taxation, 1945 Supp., Section 25.36, p. 110.

Not only is the pending enforcement action against respondents one to collect "penalties" but the action is *penal in nature. Bowles* v. *Heckman,* 64 N. E. 2d 660 and *Bowles* v. *Barde Steel Company,* 164 Pac. 2d 692, hold that an action by the Price Administrator under Section 205(e) is *penal in nature.* In *Testa and Fleming* v. *Katt,* Sup. Ct., U. S., No. 431, March 10, 1947, a *private* purchaser sued his seller in a State Court for treble damages predicated upon an alleged over-ceiling sale. In holding that the State Court was not free to refuse enforcement of petitioner's claim this Court said (slip op., p. 3):

> "For the purpose of this case, we assume, without deciding, that Section 205(e) is a *penal*

> statute in the 'public international', 'private international,' or any other sense. * * * For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid *penal* law of the United States than it has to enforce a penal law of another state or a foreign country." (Emphasis supplied.)

This Court must construe Section 205(e) as a *penal* statute in so far as it authorizes an action by the Price Administrator to collect treble damages on non-governmental purchases because the government has suffered no damage in such a case and the sole object of the action must be to *punish* a seller for violation of the Price Act.

The Opinion accompanying Order No. 45 conclusively reveals (R. 186-7) that the Order was concocted by petitioner solely to establish ceiling prices for use as evidence at the trial now pending of the enforcement action previously instituted under Section 205(e) to collect "pecuniary penalties" from respondents for alleged violations of M.P.R. 193 (R. 62-67, 70-71). The ceiling prices attempted to be established under Order No. 45 were not in existence or applicable when sales were made by respondents in January, 1943. Otherwise, there would have been no occasion for the promulgation of Order No. 45. Moreover, under Section 205(e) of the Price Act, there could not be inflicted any "pecuniary penalties" upon respondents for their sales made in 1943 because such sales were not

in excess of any existing applicable ceiling prices.[4] Petitioner cannot deny that Order No. 45 would have the effect of inflicting a "greater punishment" on respondents by subjecting them to "pecuniary penalties" to which they were not theretofore liable.

Without Order No. 45 petitioner cannot prove at the enforcement trial that the sales of respondents were in excess of any established applicable ceiling prices, because no such ceiling prices were in existence and applicable when their sales were made. Order No. 45 is clearly an *ex post facto* regulation which violates Article I, Section 9, Clause 3 of the Federal Constitution, since it not only inflicts a "greater punishment" upon respondents and "alters the legal rules of evidence" under which an overcharge could formerly be established, to-wit: proof of ceiling prices in effect and applicable at the time the sales were made, but also permits "different testimony than the law required," at the time the sales were made in 1943, to prove a violation of Section 205(e). But, worse still, Order No. 45 "creates" specific evidence (new retroactive ceiling prices) which will inflict "pecuniary penalties" upon respondents if overcharges are computed based on the difference between such new retroactive ceiling prices established illegally in 1945 and the price at which the prior sales were made by respondents in 1943. Order No. 45 is illegal and void in its entirety as clearly appears from application to the

[4]Section 1499.3(c) of G.M.P.R., as in effect during January, 1943 (R. 216-217), when sales were made by respondents, neither prescribed a maximum price nor a method or formula by which respondents could determine a maximum price. No regulation was in existence by which a maximum price could be determined by petitioner for the purpose of computing any "overcharge" under Section 205(e) of the Act.

facts of this case of principles announced in decisions of the Supreme Court next to be considered.

In *Calder* v. *Bull,* 3 Dallas 386, the Court enunciated principles for use in determining whether any given law was violative of the *ex post facto* provision in the Federal Constitution. Justice Chase said (p. 390):

> "I will state *what laws* I consider *ex post facto laws,* within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*"

Justice Patterson said (p. 396):

> "The words, *ex post facto,* when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, *and penalties.*" (Emphasis supplied.)

and (p. 397):

> "The enhancement of a crime, *or penalty,* seems to come within the same mischief as the creation of a crime *or penalty;* and therefore they may be classed together." (Emphasis supplied.)

Justice Iredell said (p. 400):

> "They [Federal and State legislatures] shall not pass any *ex post facto* law; or, in other words, shall not inflict a *punishment* for any act which was innocent at the time it was committed; nor increase the *degree of punishment* previously denounced for any specific offense." (Brackets and emphasis supplied.)

Section 205(e) of the Price Act could inflict no pecuniary "punishment" upon respondents when their sales were made in 1943 because such sales were not in excess of any existing, applicable ceiling prices. Order No. 45 *creates* a method of inflicting a "greater punishment" by providing a retroactive means for establishing overcharges and thereby "alters the legal rules of evidence" and permits "different testimony than the law required" at the time the sales were made in 1943, to prove a violation of Section 205(e).

In *Fletcher* v. *Peck*, 6 Cranch 87, Chief Justice Marshall said (p. 138):

> "An *ex post facto* law is one which renders an act punishable in a manner in which it was *not punishable* when it was committed. Such a law may inflict *penalties on the person,* or may inflict *pecuniary penalties which swell the public treasury.*" (Emphasis supplied.)

Obviously, Order No. 45 was promulgated by petitioner, for use in a pending enforcement action against respondents to "inflict pecuniary penalties which swell the public treasury." Respondents were "not punish-

able" under Section 205(e) of the Price Act when their sales were made in 1943 because the sales did not exceed any existing, applicable ceiling prices. Order No. 45 is void as an *ex post facto* regulation because it will render the prior sales "punishable" whereas they were "not punishable" under Section 205(e) when made.

The constitutional protection against *ex post facto* laws applies not only to criminal laws as such but also to *quasi* criminal laws imposing penalties and forfeitures. *Watson* v. *Mercer,* 8 Peters 88, 110; *Boyd* v. *United States,* 116 U. S. 616, 633-34; *Kring* v. *Missouri,* 107 U. S. 221, 228-29; *United States* v. *Chouteau,* 102 U. S. 603, 610, 611, and *United States* v. *Hughes* (D. C. N. Y. 1875), 8 Ben 29, 26 Fed. Cas. No. 15,416.

It is therefore clear that Order No. 45 subjects respondents to penalties, in a pending enforcement action, for exceeding ceiling prices not provided for by any price order when respondents made sales of warehouse receipts to private concerns in January, 1943. Therefore, Order No. 45 is invalid as an *ex post facto* order or regulation and void under Article I, Section 9, Clause 3, of the Federal Constitution, reading:

> "No bill of attainder or *ex post facto* law shall be passed."

Under the principle announced in *United States* v. *Fox,* 95 U. S. 670, sales made in January, 1943, which did not violate any existing ceiling prices may not be made an offense by a subsequent act of petitioner in prescribing ceiling prices for the sales on June 13, 1945.

In other words, the completed sales in January, 1943, which did not violate Section 205(e) when the sales were made cannot become an offense by any subsequent act of the petitioner with which respondents herein had no connection. *United States* v. *Dietrich,* 126 Fed. 676, 685.

Petitioner relies in this prior brief, in *Senderowitz* v. *Fleming,* No. 677, upon three decisions as a basis for his contention that the retroactive order of June 13, 1945, did not violate the *ex post facto* clause of the Federal Constitution. These cases are *Bankers Trust Co.* v. *Blodgett,* 260 U. S. 647; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, and *Calder* v. *Bull,* 3 Dallas 386. Neither of the first two cases involved any *ex post facto* issue with respect to penalties in punishment of a crime, as the ensuing analysis clearly reveals.

*Kentucky Union Company* v. *Kentucky,* 219 U. S. 140, considered a statute of Kentucky requiring land owners to pay back taxes, and providing that if an owner failed to list or pay the taxes, he was declared to be delinquent and upon an action by the Commonwealth's attorney with full notice to the interested parties, the land could be forfeited to the Commonwealth. The Court of Appeals of Kentucky held that the portion of the law *imposing penalties* of a character not theretofore imposed upon the land owner was separate from the other provisions of the law; that this imposition was *invalid* and that upon a payment of the taxes only the former owner could escape the forfeiture. The case then came to the Supreme Court where the judgment below was affirmed. It was held that the Ken-

tucky statute, as interpreted by the State Court, was not invalid because of the *ex post facto* provision in the Federal Constitution. Mr. Justice Day pointed out (p. 152):

> "We must therefore take the act as the Court of Appeals of Kentucky has construed it, *stripped of the requirement to pay interest and penalties* as a condition of saving the lands from forfeiture."

And the Court held (p. 153):

> "The Kentucky statute as construed by the Court of Appeals of Kentucky *imposes no penalty or punishment* of a *criminal nature* and is *not an ex post facto law* within the meaning of the Federal Constitution." (Emphasis supplied.)

The Kentucky statute was not an *ex post facto* law because the 1906 statute imposed "no penalty or punishment of a criminal nature" and gave claimant until January 1, 1907, to file a petition for the ascertainment of taxes assessable under the statute, and until March 1, 1907, to pay the back taxes. The Supreme Court said (p. 152):

> "But an *ex post facto* law and a retroactive law are entirely different things."

The Supreme Court also pointed out (p. 152) that it is the well-established law that a retroactive taxing statute imposing taxes or providing remedies for their assessment and collection and not impairing vested rights is not an *ex post facto* law. The payment of taxes is entirely a civil matter, the taxes are imposed

on all alike in the same classification and a law of a retroactive nature imposing taxes or providing for their assessment and collection is not in the nature of a criminal or *quasi*-criminal imposition of penalties for alleged violation of law.

In *Bankers Trust Company* v. *Blodgett,* 260 U. S. 647, the Court considered a statute of Connecticut which provided that all taxable property of any estate upon which no tax has been assessed, or upon which no tax has been paid the State during the year preceding the decedent's death, should be liable to a tax of 2% per annum on the appraised inventory value of such property for five years next preceding the decedent's death, with a provision that a personal report might show a payment during the five-year period and obtain a proportionate abatement. There was a right of appeal in the event of dispute over the tax. The Supreme Court held that this statute was not an *ex post facto* law. It said (p. 652):

> "The penalty of the statute was *not* in punishment of a crime, and it is only to such that the constitutional prohibition applies. It has no relation to retrospective legislation of any other description." (Emphasis supplied.)

Order No. 45 here under attack was issued by petitioner for the *sole purpose* of serving as the medium for the *infliction of penalties* upon respondents as *punishment* for their *alleged crime* of making sales in excess of prices permissible under the regulations. The Order is in plain violation of the *ex post facto* clause of the Federal Constitution.

At page 23, *supra,* the principles enunciated in *Calder* v. *Bull* have been quoted, and it has been demonstrated that application of the principles announced in that case, and in other cases cited at pages 23 to 25, *supra,* conclusively show that Order No. 45 is a retroactive order imposing "pecuniary penalties" upon respondents herein in plain violation of the *ex post facto* clause of the Federal Constitution.

The case of *Graham & Foster* v. *Goodcell,* 282 U. S. 409, does not support the issuance of Order No. 45. There the Court said (p. 426):

> "This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached."

In the instant case no liability for penalties under Section 205(e) attached when sales were made in January, 1943, because the sales were not in excess of any existing ceiling prices and respondents did not "violate" (present tense) any existing price order prescribing maximum prices. Order No. 45 does "attempt retroactively to create a liability" in respect to prior sales as to which no liability for penalties had previously attached. See Bowles v. Griffin, 151 F. 2d 458, 461.

Section 205(e) of the Price Act defines "overcharge" as meaning "the amount by which the consideration exceeds [present tense] the applicable maximum price" in effect at the time of sale. (Brackets supplied.) There being no "applicable maximum price" in effect when sales were made by respondents in January, 1943, no standard existed whereby any

"overcharge" could be computed under Section 205(e). Order No. 45 sought to create an "applicable maximum price"—over two years after sales were made—and by its retroactive application determine "overcharges" and impose "pecuniary penalties" upon respondents in direct violation of the *ex post facto* prohibition contained in Article I, Section 9, Clause 3, of the Federal Constitution.[5]

## IV. Order No. 45 Is Violative of the Due Process Clause of the Fifth Amendment to the Federal Constitution.

In *Mulford* v. *Smith*, 307 U. S. 38, the statute there before the Court was held not to operate retroactively in violation of the due process clause of the Fifth Amendment because (p. 51):

> "The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated."

Exactly the opposite situation exists in the instant case. There can be no question but that Order No. 45 was issued to, and will, operate retroactively because its sole purpose was to establish retroactive ceiling prices for application to sales completed over two and one-half years before issuance of the infamous order.

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[5]No cause of action could exist *unless* an "applicable maximum price" was in existence at the time of the sales in January, 1943. Order No. 45 was issued on June 13, 1945, and purported to create *new* "applicable maximum prices." At that time—June 13, 1945—any further cause of action, under Section 205(e), for prior sales in January, 1943, was extinguished by the lapse of over one year from the dates the prior sales were made. *Matheny* v. *Porter*, 158 F. 2d 478, 479.

Clearly, Order No. 45 will deprive respondents of their property without due process of law in violation of the Fifth Amendment by subjecting them to enormous pecuniary penalties approximating seven million dollars based on ceiling prices which were not in effect when their sales were made in January, 1943.

Any cause of action for penalties is created and limited by the Price Act. Section 205(e) of that Act subjects a seller to penalties only if he violates (present tense) an existing price order. Section 205(e) "will not be construed retroactively to create liability. To give it that effect would be to deprive defendant [respondents] of his property without due process of law in contravention of the Fifth Amendment." *William Danzer & Co., Inc.*, v. *Gulf & Ship Island Railroad Company*, 268 U. S. 633, 637.

There is no similarity between the facts of and issues in cases[6] cited at pages 11 to 12 of respondents' brief in Senderowitz v. Fleming, No. 677, and the facts and issues of the case here involved. In none of the cases cited by petitioner in which the courts have upheld retroactive statutes has there been involved the issue as to the right of the Government to collect penalties through penal actions based on an *ex post facto* administrative order such as Order No. 45. Order No. 45 far more plainly is "arbitrary, capricious and

[6]For example, the cases of *United States* v. *Heinszen & Co.*, 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, involved the legality of acts of Congress enacted to ratify prior collection of duties and raised the simple issue whether Congress possessed the power to ratify; this Court held that it did. *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8, applied the principle of the above cases and held that a state legislature possessed the power to ratify a special improvement tax.

amounts to confiscation" than did the tax and other statutes declared to be violative of the Fifth Amendment in *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Untermyer* v. *Anderson*, 276 U. S. 440; *Coolidge* v. *Long*, 282 U. S. 582; *Ettor* v. *Tacoma*, 228 U. S. 148; and *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139.

**V. Order No. 45 Deprives Respondents of Their Rights Under Sections 203(a) and 204(a) of the Emergency Price Control Act.**

Order No. 45 attempts to prescribe inchoate, conditional ceiling prices which "will be applicable only" in the event the District Court finds at the actual trial of the pending enforcement action that maximum prices for sales of warehouse receipts of bulk whiskey in January, 1943, could not be established under Section 1420.13(a) or (b) of M.P.R. 193 (R. 187). Naturally, respondents cannot now exercise their statutory rights to protest, under Section 203(a), and appeal, under Section 204(a) to the Emergency Court of Appeals, against the measure of inchoate ceiling prices that in no event could become applicable except during the actual trial of the enforcement action. Within the meaning of Section 203(a) of the Act, respondents are not now "subject to" inchoate ceiling prices which by the Opinion accompanying Order No. 45 are not applicable but which may become applicable at some later date. *Cf. Parker* v. *Fleming*, No. 80, decided January 20, 1947, by this Court. Furthermore, Section 24 of Revised Procedural Regulation No. 1 specifically provides:

> "A person is * * * *subject to* a provision of a maximum price regulation *only if* such provision *prohibits* or *requires* action by him." (Emphasis supplied.)

and Order No. 45 neither "prohibits" nor "requires" any action by respondents at this time with respect to the *measure* of the inchoate ceiling prices.

Since the inchoate prices attempted to be conditionally prescribed in the Order are to become "applicable" *only* upon findings by the District Court at the actual trial of the pending enforcement action, respondents will, if the inchoate prices ever become applicable, be deprived of all rights under Sections 203(a) and 204(a) of the Act to protest the *measure* of the prices after they become applicable. Time would not permit the filing or processing of a protest and appeal to the Emergency Court under Section 204(a) after a ruling by the District Court at the trial. No power exists in the Price Administrator to issue orders, such as Order No. 45, which deprive respondents of their plain rights under Section 203(a) and Section 204(a). In effect, Order No. 45 operates to repeal Sections 203(a) and 204(a) of the Act because it makes both sections unavailable to respondents to contest the measure of the inchoate ceiling prices conditionally prescribed in the Order even should the prices later become applicable during the trial of the enforcement action. Thus, Order No. 45 deprives respondents of due process of law in violation of the Fifth Amendment to the Federal Constitution.

It will be noted that respondents have protested the validity of Order No. 45 in its entirety—as distinct from a protest to the measure of the inchoate, conditional ceiling prices—because they will never be able to protest, under Section 203(a), the measure of the inchoate ceiling prices which are not now applicable but which may become applicable as a result of a ruling by the District Court at the actual trial of the pending enforcement action. Respondents contend that Order No. 45 is illegal in its entirety because the Order (a) is not in accordance with law, (b) is not authorized by Section 1499.3(c) of the General Maximum Price Regulation, (c) is not authorized by Section 2, or any other section of the Price Act, (d) is violative of Article I, Section 9, Clause 3 of, and the Fifth Amendment to, the Federal Constitution, and (e) is violative of and in conflict with Sections 203(a), 204-(a), 204(d) and 205(e) of the Price Act. If the contentions of respondents are sound, Order No. 45 is invalid in its entirety.

No self-serving interpretation of Order No. 45, and Opinion accompanying same, by petitioner (as attempted by his intermediate orders of May 2 and 15, 1946, R. 130, 143, entered after the general protest was filed) can (1) make legal an Order which was obviously invalid *ab initio,* or (2) deprive respondents of their constitutional and statutory rights, under unambiguous provisions of the Constitution and the Price Act, to protest the invalidity of ceiling prices when and if they become "applicable" or (3) force respondents now to protest the measure of ceiling

prices which are conditional and not yet "applicable" because the District Court has not made findings which, under the Order and Opinion, are a prerequisite to the new prices ever becoming "applicable." Respondents contend that the orders of May 2 and 15, 1946, were illegal because, within the meaning of Section 203(a), respondents were not "subject to" conditional ceiling prices which were not "applicable" to their prior sales, and no order of petitioner could have the effect of enlarging the meaning of the language in the statute so as to require respondents now to protest the measure of conditional, retroactive ceiling prices which could become "applicable" only if and when certain findings were made by the District Court at some indefinite future time.

## VI. Other Decisions Relied upon by Petitioner Are Clearly Inapplicable Because They Did Not Involve Any Ex Post Facto Regulation Imposing Pecuniary Penalties.

*Addison* v. *Holly Hill Fruit Company,* 322 U. S. 607, was an action brought by employees against their employer for wage payments under the Fair Labor Standards Act, 29 U. S. C. Section 201, *et seq.* This was an ordinary civil action. It was *not* brought by the Administrator to recover any penalties under the law and is in no way analogous to the case at bar. The Supreme Court remanded the case to the trial court with directions to retain jurisdiction until the Administrator made a definition within the authority granted him by the Congress, which definition was essential to

a proper determination of the case. In the instant case, there are controlling *constitutional reasons* why retroactive Order No. 45 may not be permitted to establish "applicable" ceiling prices—over two years after sales have been made—which retroactive prices will be used in an enforcement action under Section 205(e) to inflict *pecuniary penalties* upon respondents approximating $7,000,000, when petitioner seeks to calculate fictitious "overcharges" based on the difference between the prices at which the whiskey was sold in January, 1943, and the "new" retroactive prices illegally sought to be established in June, 1945.

*General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, was an action brought by a lessor against its lessee to recover amounts due under the contract. Defendant refused to make payments on the ground that the amounts claimed were rebates, illegal under the Interstate Commerce Act, 49 U. S. C. Section 1, *et seq.* The Supreme Court held that the federal court had jurisdiction over this simple contract action, but that the Interstate Commerce Commission was the proper body to determine the validity of the payments, and that the action should not be dismissed but should be held pending the conclusion of appropriate administrative proceedings to establish the validity of the payments. The Interstate Commerce Commission had never acted on the case at all and there is no retroactive or penalty feature involved.

*El Dorado Oil Works* v. *United States,* 328 U. S. 12, was a sequel to the above case. In its later opinion the Court merely held that the Interstate Commerce

Commission had power to issue an order fixing the amount payable to lessees of privately owned cars out of the mileage allowance made by the carrier for their use.

*Thompson* v. *Texas-Mexican Ry. Co.,* 328 U. S. 134, involved the right of a lessor to declare the forfeiture of a lease; this Court held that the District Court should not have acted until the Interstate Commerce Commission had determined whether the public interest required the line of railroad to be operated by the lessee rather than the lessor, and that this was a question for the Commission to decide under Section 1(18) of the Interstate Commerce Commission Act. *Smith* v. *Hoboken R. R., Warehouse & S. S. Connecting Co.,* 328 U. S. 123, involved the right of a lessor to terminate traffic rights over its lines by a lessee; this Court held that the District Court should have withheld judgment on the merits until the Interstate Commerce Commission had determined whether the public interest would permit abandonment of operations by the lessee under the traffic agreement. Neither case involved collection of pecuniary penalties by the government under an *ex post facto* regulation, such as Order No. 45.

*R. H. Stearns Co.* v. *United States,* 291 U. S. 54, involved a claim for refund of a tax which had been credited at the taxpayer's request upon another tax obligation of the taxpayer. The theory of the claim for refund was that a waiver had not been signed by the Commissioner of Internal Revenue. It was held that the taxpayer's request to apply the credit and the

payment by the taxpayer of the balance claimed to be due resulted in his estoppel to take advantage of the waiver not signed by the Commissioner during the term. There is nothing in the instant record to indicate that respondents prevented the Price Administrator from establishing specific maximum prices, applicable to their sales of whiskey, before the sales were consummated. Obviously, the mere failure of respondents to apply for the establishment of maximum prices before their sales were made cannot estop them from contesting the validity of Order No. 45 as not authorized by Section 1499.3(c) of the General Maximum Price Regulation or the Price Act and as an *ex post facto* regulation which violates Article I, Section 9, Clause 3 of the Federal Constitution and deprives them of due process of law in violation of the Fifth Amendment to the Federal Constitution. Petitioner overlooks the fact that Order No. 45 was issued to create the means of enforcing a "pecuniary penalty" upon respondents. The rule is that equitable powers of the court will not be used to enforce a penalty but, on the contrary, will be used to prevent forfeitures and penalties. *Ash Sheep Company* v. *United States,* 252 U. S. 159; *Marshall* v. *Vicksburg,* 15 Wall. 146.

## VII. Erroneous Dictum in Opinion of Emergency Court Is No Ground For Grant of Certiorari.

In its original opinion (R. 317) the Emergency Court of Appeals stated that the first sentence of Section 1499.3 of the General Maximum Price Regulation "itself definitely established maximum prices for the complainants."[7] The Court further said that the first sentence of said Section 1499.3 of the G.M.P.R. reading: "The seller's maximum price for a commodity * * * shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation," laid down a "definite standard" (R. 317) and that the District Court in the enforcement action could translate this general standard into dollars and cents prices applicable to the sales of respondents.[8] Such *dictum* of the Emergency Court is obviously erroneous.

The statement of the Emergency Court (R. 317) that subparagraphs (a), (b), (c) and (d) of Section 1499.3 of the General Maximum Price Regulation, as in effect during January, 1943 (7 Fed. Reg. 7093, R. 216-217), provided a "procedure" whereby a seller might himself make a "definite determination of the in-line maximum price" before actually making a sale

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[7]Petitioner admits at page 16, and in note 7 on page 17, of its memorandum in *Senderowitz* v. *Fleming*, Docket No. 677, and at pages 10, 13, 16, 18, of its instant application, that the dictum is erroneous and not in accordance with the Administrator's own interpretation of Section 1499.3 of G.M.P.R. It follows that no special or important reason exists why this Court should correct the erroneous dictum. The error is a matter of insignificance in relation to this application for certiorari.

[8]The protest raised no such point and the Emergency Court has no jurisdiction to consider questions not raised in a protest. Section 204(a) of the Emergency Price Control Act.

clearly shows that the first sentence of the section did not establish a definite ceiling price within the meaning of Sections 2(a), 4(a), 205(b) and 205(e) of the Price Act. Clearly, no "definite standard" or actual existing ceiling price was established, or intended to be promulgated, by the first sentence of Section 1499.3, which merely provided for a "maximum price in line with the level of maximum prices established by this General Maximum Price Regulation," but which maximum price was to be ascertained by resort to the "procedures" contained in the following paragraphs (a), (b), (c) and (d). That the above is the correct interpretation of original Section 1499.3 of the General Maximum Price Regulation is emphasized by the merger of the first and second sentences of the original section into one sentence when the section was amended on June 1, 1944 to read (R. 207):

> "* * * shall be a maximum price in line with the level of maximum prices established by this regulation *and* shall be determined in the following manner." (9 Fed. Reg. 5169-5173.) (Emphasis supplied.)

Under the theory of the Emergency Court, it must be contended that "a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation" was a sufficiently "definite standard" to subject respondents to criminal prosecution under Sections 4(a) and 205(b) and the "pecuniary penalties" under Section 205(e) of the Price Act for making sales in excess of prescribed maximum ceiling prices. Such a "maximum price in

line with the level of maximum prices established by this General Maximum Price Regulation" was not as specific as (certainly no more specific than) the language of the Lever Act prohibiting sales at any "unjust or unreasonable charges," yet the latter statute was held unconstitutional in *Cohen Grocery Co.* v. *United States,* 255 U. S. 81, because it did not constitute an ascertainable standard of guilt and was not adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. The same unconstitutionality would exist with respect to efforts to torture specific maximum prices from the general language in the first sentence of Section 1499.3 of the General Maximum Price Regulation despite the "procedure" prescribed in subparagraph (c) of that section. Until the procedure has been followed no one could guess what "method" would be prescribed by the Price Administrator for the determination of maximum prices by the seller or what maximum prices would be "determined by the seller" under the future authorization of the Price Administrator. That the Price Administrator correctly considered the general language in the first sentence of Section 1499.3 of the General Maximum Price Regulation to be totally inadequate as a basis for the collection of pecuniary penalties, fines or impositions of imprisonment is conclusively shown by the issuance of Order No. 45 on June 13, 1945, and which order was held invalid by the Emergency Court.

The principle of the *Cohen Grocery Company* case, *supra,* was applied in *Kraus & Bros. Inc.* v. *United*

*States,* 327 U. S. 614. That case involved the construction of the evasion section of a price regulation, and it was held that the evasion section, as worded, prohibited only those tie-in sales which involved secondary products that were worthless or that were sold at artificial prices. This Court said (pp. 621-622):

> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, *the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation.* See *United States* v. *Wiltberger,* 5 Wheat. 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. *The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.*" (Emphasis supplied.)

and (p. 622):

> "A prosecutor in framing an indictment, *a court in interpreting the Administrator's regulations* or a jury in judging guilt *cannot supply*

*that which the Administrator failed to do by express word or fair implication.* Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. *The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act.* Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States* v. *Resnick,* 299 U. S. 207." (Emphasis supplied.)

The language just quoted conclusively shows that the Price Administrator could not, and did not, prescribe maximum prices, by use of "vague language" appearing in the first sentence of Section 1499.3 of the General Maximum Price Regulation (R. 216-217), so as to subject respondents to "pecuniary penalties" and to criminal prosecution for making sales at prices in excess of *theoretical* prices that might be computed through a *fantastic* interpretation of such an "indefinite standard." The erroneous *dictum* of the Emergency Court completely disregarded the fundamental principles which were reiterated in the *Kraus Bros.* case.

The principle announced in *Thomas Paper Stock Co.* v. *Porter,* 328 U. S. 50, is applicable in the instant matter. There, the Supreme Court held that, after the Taft Amendment, sales of waste paper were *not* governed by maximum prices based on a standard prior to the determination by the Administrator on Septem-

ber 11, 1943, that there was no practicable alternative to such standardization. Upon the same reasoning, sales by respondents of the whiskey here in issue were not governed by any non-existing maximum prices prescribed by the first sentence of Section 1499.3 of the General Maximum Price Regulation (R. 216-217), as in effect during January, 1943, prior to an application by respondents to the Price Administrator for "authorization" of a "method" of determining maximum prices and the actual "determination by respondents" of maximum prices based on the "method" of determining such prices authorized by the Price Administrator.

## CONCLUSION.

The judgment of the Court below is correct. The Court is requested to deny the petition for certiorari.

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# APPENDIX.

## STATUTE INVOLVED.

1. **Emergency Price Control Act.**—The pertinent sections of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. V, 901, et seq.), are as follows:

Section 2 (b). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

Section 2 (d). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

Section 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 205 (b). Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment.

* * *